

for The Defense

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The Training Newsletter for the
Maricopa County Public Defender's Office

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Should Your Client "Just Say 'No'" To Jail Antipsychotic Drugs?

by Christopher Johns and Barbara Spencer

Does your client have the right to refuse to take antipsychotic medications that may help her become competent and may distort a jury's perceptions of her during trial? The answer under *Riggins v. Nevada*, 112 S.Ct. 1810 (1992) is a qualified "yes." A client's decision to not take medication, however, raises many difficult issues for the criminal law practitioner.

Some estimates put the number of our clients with some form of mental illness at about 15%.¹ Many more of our clients have other psychological problems that often are intertwined with the offenses that they have committed. In most instances, even before the Rule 11 process is initiated, the jail psychiatric unit begins intervention.

Antipsychotic Medications

The intervention to restore the person to "normalized" or controllable behavior is by the use of antipsychotic drugs (also known as "neuroleptic" or "psychotropic" drugs). The client may also receive antidepressive or antianxiety drugs. Antipsychotic drugs affect thought processes by altering the chemical balance in the brain. They don't cure the illness--but usually stop the most serious symptoms. The most commonly prescribed antipsychotic drugs are Navane, Mellaril, Prolixin, Haldol, and Stelazine.

The antipsychotic drugs, in particular, have side effects. These may include everything from difficulties in speech, swallowing and breathing to Parkinsonism (involuntary muscle spasms), apathy, and even sudden death. Some clients also may experience neck and arm stiffness, as well as sedation. Another reaction is that the client may be restless and step from foot to foot. Some side effects may be controlled through use of other medication.

Often our clients come to us because they have stopped taking antipsychotic medications, since many dislike the side effects. Off medication they commit crimes ranging from dine-and-dash to homicide, and end up in the jail's care.

When representing clients experiencing mental health problems, two issues emerge: competency and the insanity defense.² As most practitioners know, the insanity defense has been drastically amended to provide that a person may be found "guilty except insane." How amendments to the insanity statutes will affect the insanity defense is still unknown.³

The Riggins' Limited Holding

Riggins v. Nevada involved a case where a schizophrenic man killed his drug supplier because he thought the supplier was putting AIDS-infected blood in his cocaine. At trial where an insanity defense was asserted, the accused moved to discontinue his medication (Mellaril) on the grounds that it would prejudice his defense. The motion was denied and the case eventually went to the U.S. Supreme Court.

The Court ducked directly addressing the issue of whether the state may force an accused to take medication to make her competent to stand trial. The Court did, however, hold that the state may force an incompetent defendant to take antipsychotic drugs before and during trial only in certain circumstances. It reversed Riggins' conviction because the state made no showing that a less prejudicial alternative was unacceptable.

(cont. on pg. 2)



The crux of the Court's holding is that the state's interest in bringing the accused to trial must be balanced against her interest in personal autonomy and right to a fair trial.

The accused's interest is based on the due process clause of the constitution. The Court also relied heavily on the precedent of *Washington v. Harper*.⁴ That 1990 decision established that a prison inmate has a constitutionally protected "liberty interest" in being free from forced medication. *Harper* provides that the state may only force medication on a prisoner if it is shown that the inmate poses a danger to herself or others, and the treatment is medically appropriate. Under *Riggins* the trial court must be shown that the state has an overriding interest in having your client medicated.

The central issue for defense counsel taking a client on antipsychotic drugs to trial is what impact medication has on the client's cognitive abilities, and how it makes the client appear. In *Riggins*, defense counsel wanted the client off medication to substantiate his insanity defense. Mellaril, for example, may make a client appear so calm and sedated as to look bored, cold, unresponsive and unfeeling. Haldol, on the other hand, may make a client look stiff, nervous or restless, which jurors may perceive as being deceitful. In other words, the client is prejudiced by her own appearance to the jury. This is particularly important because many stock jury instructions include an advisory to jurors to consider witnesses' demeanor.

FOR THE DEFENSE

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The central issue for defense counsel taking a client on antipsychotic drugs to trial is what impact medication has on the client's cognitive abilities, and how it makes the client appear.

First, if the client decides not to take medication so that the jury can see her true demeanor, and the client becomes disruptive---and incompetent, does her desire not to be medicated mean she has waived a mistrial or the issue of competency?

The analysis in *Riggins* is similar to that employed in earlier cases that prohibits the state from trying a person in her prison garb over objection.⁵ Additionally, as in *Riggins*, expert testimony about the effects of antipsychotic medication may not cure the prejudice.

Since *Riggins* doesn't answer all of the issues, practitioners should be aware that several state courts have found that forced psychiatric drug medication of an accused arguing an insanity defense has been held to violate due process.⁶ Additionally, Justice Kennedy's concurrence in *Riggins* is helpful. Kennedy's view is that the state may not give an accused drugs to make her competent. As an alternative, Justice

Kennedy proposes having the state involuntarily commit an accused to a mental hospital instead of risking the prejudicial impact of forced medication. And, Kennedy suggests that a higher competency standard should be used for an accused taking antipsychotic medication.

Practical Problems

There are many problems with *Riggins*, particularly for practitioners trying to deal with its holding. First, if the client decides not to take medication so that the jury can see her true demeanor, and the client becomes disruptive---and incompetent, does her desire not to be medicated mean she has waived a mistrial or the issue of competency? According to Justice Kennedy, probably not. Second, to avoid a mistrial, what alternatives might exist? The thrust of *Riggins* is that medical testimony about the client's demeanor is insufficient. Practitioners might want to consider, however, a videotape of the client off medication to show her in an unmedicated state. This, of course, gives only one small glimpse, but could be an alternative.

An additional problem faced by the practitioner is what, if any, ethical ramifications may be involved in advising a client not to take medication? No cases or commentators appear to have addressed this issue, apparently assuming that no such issue exists. This issue, however, appears to be one involving not only legal defense, but also medical advice that might have additional consequences.

¹ Conversation with Dr. Jack Potts, Maricopa County Correctional Health Services.

² See Rule 11, Ariz. R. Crim. P.

(cont. on pg. 3)

³ See S.B. 1139 (Chapter 256). "A person may be found guilty except insane at the time of the commission of the criminal act if the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." A.R.S. Sec. 13-502 (effective January 1, 1994).

⁴ 494 U.S. 210 (1990).

⁵ *Estelle v. Williams*, 425 U.S. 501 (1976).

⁶ See, e.g., *State v. Maryott*, 492 P.2d 239 (Wash. Ct. App. 1971) (holding that requiring an accused to take mind-altering drugs during trial violates right to fair trial.); *Commonwealth v. Louraine*, 453 N.E. 2d 437 (Mass. 1983). ^

Editor's Note: The underlying disorder determines the kind of medication a client should take. Whether you make a decision to request a client to discontinue medication may be determined by the illness. For example, the above article is primarily aimed at clients diagnosed as having schizophrenia. Considerations for a client suffering from manic-depressive illness may be different. Before defense counsel considers such a tactic, it is the editor's opinion that a mental health care professional should be consulted.

"Parting is Such Sweet Sorrow: Should You Represent The Same Client a Second Time?"

by Bob Doyle and Christopher Johns

While every criminal defense lawyer would prefer to never need to represent the same person twice, it is an unfortunate fact that yesterday's client may some day be tomorrow's client. The Maricopa County Public Defender's Office has a policy that an attorney may, but is *not* required to, represent an accused that he or she has previously represented. An attorney in the office may, at his/her discretion, accept or decline to represent a client on a new matter where the previous representation is now closed. There are differing opinions as to whether attorneys should represent old clients again or should decline such cases. Two attorneys in our office, Christopher Johns and Bob Doyle, have volunteered their personal comments on both sides of this issue. These comments are the personal opinions of the authors and are not to be taken as office policy. Such opinions may be useful to attorneys in determining what they consider best.

New counsel's fresh perspective may also benefit the client with the prosecutor and the judge.

Perhaps by showing that I have not given up on the client, I can dispel the rush to condemn the client.

Should a Criminal Defense Lawyer Accept a Former Client as a New Client on a New, Unrelated Charge? Never by Bob Doyle

As a personal policy, I have elected to never represent a former client as a new client on a new charge. I apply my personal policy to all cases and make no exceptions.

I have a number of reasons why I feel it best to decline representation. First, there can be difficulties reestablishing a proper relationship with the client. If the attorney has worked particularly hard and achieved a particularly good result, there is a significant possibility that a measure of disappointment will taint the new relationship. An attorney may, either consciously or unconsciously, feel that the client has foolishly undone all the attorney's hard work. From the client's perspective, the client may feel that the attorney did not previously perform up to par or did not properly prepare the client for future situations. This undercurrent of mutual disappointment may substantially interfere in the attorney-client relationship.

A change of defense counsel may be the best thing for the client in new situations. It is always possible that the previous attorney made a noteworthy mistake in the previous representation. If the attorney who made the mistake undertakes new representation, that attorney may never realize that mistake and be unable to exploit it for the client's benefit. New counsel may be able to review the old matter, see a serious flaw that the first attorney missed, and seek appropriate relief. None of us knows what we missed in our professional "blind spot."

New counsel's fresh perspective may also benefit the client with the prosecutor and the judge. There is a significant danger that former counsel's credibility on this case has been used up. Going back to the prosecutor and the judge with the same client raises the specter that other participants in the criminal justice process may now have lost confidence in defense counsel's position. Going back to the same well always presents problems; going to the same well with the same bucket can only make matters worse.

Some attorneys feel that it will harm the client if they try to establish a new relationship with a new attorney. There is a concern that important information will be lost. One solution to this problem is for former counsel to have a long talk with the new attorney. While I have declined to be lead counsel for former clients on new offenses, I have generally made myself available to new counsel to talk about the former client and the old case. Just because you're not the one standing up in court for the client doesn't mean you should be out of the picture entirely. Any information you possess that would be useful to new counsel should be discussed.

(cont. on pg. 4)

A final reason to never represent the former client is that our clients are represented by the Maricopa County Public Defender's Office. While I do everything I can for my clients, I am not their personal barrister. They are represented by the Maricopa County Public Defender's Office and we will, in all appropriate situations, represent them now and in the future. However, there are no guarantees they will be represented by any particular attorney. They are the clients of our firm.

In conclusion, all of the potential advantages of taking a former client's latest case can be accomplished through communicating with that person's new counsel. This policy avoids all of the personal and ethical dilemmas that can come up in new representation of a former client. Applying the same policy to all clients is the fairest way to treat them. It is never an issue of whether I like or dislike them. To me, the issue is whether or not the client will be better served. I feel they will be.

Representing The Same Client Again Has Many Benefits
by Christopher Johns

Bob, you ignorant #!?!@! Just kidding. Despite the office policy that allows an attorney not to represent the same client the second time around, I have done so many times. Probably more often than not.

There are several reasons why I do so. If the client is coming back to me, it usually means that I got a good result the first time around (an acquittal, probation or a really short prison term). Since I handled the first case, familiarity with the former charges and the client is not an issue. Usually, the client and I have a working relationship. The client knows what to expect, and I have thoughts about the best way to work with the client on the new charges.

Instead of being tainted by the former representation as Bob suggests, I do not think that my own motivation is dampened. Given the horrible lives some of our clients have lived, I know it is hard to pull out of a cycle of poverty, drugs, mental illness, or whatever other reasons suck people into the criminal justice system. I think I can deal with the client's problem more effectively, since I know the history. In fact, I may have a much better insight into how to help the client now that I am representing her the second time. For example, if alcohol is the problem propelling the client into the "system," maybe the client and I can talk candidly about her sobering up to face reality.

While I do agree there may be situations where a change of counsel is best, to do so because there are potential errors in the file seems to me disingenuous. If I goofed up, and see that I was ineffective, I'll bring it to the client's attention. My feeling is that the client is entitled to excellent representation, not just a "competent" attorney. I do not begrudge any client from benefiting from a mistake I may have committed. Much of what we do is judgment calls--and second-guessing them is difficult.

The issue of credibility is a problem. However, the primary role of a criminal defense lawyer is to be the champion for the client. We act as an "equalizer." My job in the context of representing a client that may have made another mistake is harder, but not impossible. Even if it is another attorney in the office, the judge and prosecutor will know that the client previously went through the system. Perhaps

by showing that I have not given up on the client, I can dispel the rush to condemn the client.

Moreover, my role as the client's champion forces me to subordinate my personal evaluation of the client's conduct; my job is to exploit all legal points available.

Lastly, and trying not to sound too self-righteous, I try to find something to like in clients. Sometimes it is impossible to find such a trait. Sometimes they have a trait that is likeable, and helps to motivate my representation. If there is no trait, then I keep in mind at all times how important a public defender's job is. If criminal defense lawyers weren't around, this country would be a police state in an instant.

When the same client comes back again, no matter how disappointed I am, it is just one more chance for me to vindicate her and reaffirm the constitution. In almost every case, our client's constitutional rights are violated in one way or the other (we just don't always find them). If the government has broken the law to get the accused, no matter how many times I've represented the same client, I'll be her champion. CJ ^

Practice Pointers

Taking the Fifth and Sixth and Moving Early To Do So

Here's a common scenario. The client is arrested and appointed counsel. That night or the next day, the police go to her cell and ask her about other crimes unrelated to the one for which she has been appointed a lawyer. Even though you have counseled the client, the pressure gets to her or she fails to fully understand what you told her. The client makes inculpatory statements about other crimes, and your trial and negotiating positions are weakened. Can anything be done? Yes, a motion filed as soon as possible after appointment asserting Sixth and Fifth Amendment rights may protect the client from further police harassment.

Remember that the Sixth Amendment right to counsel is offense-specific. It attaches after appointment, and once invoked means that any subsequent waiver during police-initiated custodial interviews is ineffective. The right to counsel may not be invoked for future prosecutions, however, since it does not attach until the prosecution starts. In other words, incriminating statements about other crimes, when the Sixth Amendment has not attached, are admissible at the trial of those offenses.

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On the other hand, the Fifth Amendment guarantee that "[no] person . . . shall be compelled in any criminal case to be a witness against [herself]" has created a more protective body of law for clients stemming from *Miranda v. Arizona*. One of those protections is the right to have counsel present. Moreover, in *Edwards v. Arizona*, the supreme court further held that once a suspect asserts his "Miranda" rights, not only must current interrogation end, but the accused may not be approached for further interrogation "until counsel has been made available. . . ." Which means---as the court held in *Minnick v. Mississippi*, 498 U.S. ___, 111 S.Ct. 486 (1990), that counsel must be present. The rule is designed to prevent police from badgering our clients into waiving previously asserted *Miranda* rights.

What that means is that the *Miranda* right to counsel is not offense-specific. Once it is asserted, it prevents any further police-initiated interrogation outside the presence of a lawyer. And, as it stands now, there is no time limit on that assertion. So the Sixth Amendment right to counsel may not imply the invocation of the Fifth Amendment right to counsel. To protect clients it may be necessary to file a motion in the early stages of representation when there is any fear that the police will re-initiate contact to talk about other crimes.

The motion should be captioned something like "Invocation of Fifth and Sixth Amendment Rights." It should contain the following language:

I, _____, by this notice exercise my Fifth Amendment right not to be compelled to incriminate myself and my Sixth Amendment right to counsel under the U.S. Constitution, as to any and all interrogations, custodial or otherwise. I further invoke all rights I am entitled to under Article II, §§ 10 and 24 of the Arizona Constitution as to my right to counsel and not to incriminate myself. This invocation is further supported by *McNeil v. Wisconsin*, ___ U.S. ___, 111 S.Ct. 2204 ___ L.Ed.2d ___ (1991) (*Miranda* right to counsel is not offense-specific, and once asserted, prevents any further police-initiated interrogation outside counsel's presence).

Questions by any law enforcement agency or their agents must be directed to my assigned counsel at the Law Offices of the Maricopa County Public Defender.

The motion should be dated and signed by the client and defense counsel. A copy should be filed with the Clerk of the Court, and copies sent to the county attorney's office, and the court where the case is to be assigned.

The client should be given a copy of the motion to keep with her to show to any police that show up to interrogate her. The key, of course, is filing it quickly to prevent the police from further interrogating the client. Copies of a sample motion are available from the Training Division.

Conflicts: Order by Judge to Screen Attorney Abuse of Discretion

On September 28, 1993, the Arizona Court of Appeals issued its decision in *Okeani v. Superior Court*. This stems from a special action filed by Tim Ryan of our Mesa Office. This case involved a situation where a Trial Group C attorney (Scott Halverson) learned that the alleged victim in the

case was represented by Teri Shaw of our Juvenile Division. Halverson obtained a copy of the police reports on the alleged victim and determined that in order to properly represent Mr. Okeani, it would be necessary to impeach the alleged victim with the information. Since this presented an irreconcilable conflict, Halverson notified the trial court that our office represented the accused and the alleged victim, and moved to withdraw from further representation of Mr. Okeani.

The trial court (The Honorable Steven Sheldon), however, ordered the Maricopa County Public Defender's Office to return the police report obtained for impeachment purposes, and not to talk to Teri Shaw in our Juvenile Division about the case. A special action was filed since there is no adequate remedy by appeal.

The opinion in *Okeani*, authored by Judge Jefferson L. Lankford, notes that under ER 1.7 the trial court was required to permit withdrawal because the office could not represent the accused and the alleged victim. The court wrote that:

The Public Defender's representation of defendant would have been "directly adverse" to its representation of the alleged victim. Halverson was bound to zealously represent his client, [citation omitted], including impeachment of a victim witness. Yet because the victim was also a client of the Public Defender's Office, fulfilling the duty to defendant would have adversely affected another client of the same office. Conversely, protecting the victim from impeachment would have injured the defendant. This is clearly a conflict of interest from which the trial court was required to relieve counsel by permitting withdrawal.

The opinion notes also that the Maricopa County Public Defender's Office is one firm for purposes of conflicts of interest, and that ER 1.10(a) is applicable to conflicts. Additionally, even if the juvenile case has involved a former client, the provisions of ER 1.9 would have prevented further representation of the present client.

Involuntary HIV Testing

In previous issues of the newsletter the issue of coerced HIV testing of clients has been addressed. In many instances, the state cannot meet the evidentiary standard required under A.R.S. § 13-1415 to have clients tested for HIV. The state must show that there was "sufficient exposure" consistent with the Center for Disease Control (CDC) guidelines for transmitting the infection. At the very least, this requires an evidentiary hearing with the victims and a medical doctor familiar with CDC guidelines.

Additionally, A.R.S. § 13-1415 has serious constitutional infirmities that may be argued. Invasion of right to privacy and being overbroad are just two constitutional challenges that are available. Lastly, the statute is irrational as public policy. Testing a defendant, months or years after an offense, can never tell the victim whether she is infected. The only way for people to know whether they are infected with HIV is to be tested themselves.

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Anyone who receives a motion or request to have one of our clients tested for HIV should contact Christopher Johns. If contract lawyers have cases involving this issue, please also let me know. Time permitting, an amicus may be prepared.

September Jury Trials

August 30

Robert Billar: Client charged with criminal trespass (with priors and while on probation). Trial before Judge Rea ended September 1. Client found guilty. Prosecutor R. Hinz.

Richard Krecker: Client charged with aggravated robbery. Investigator D. Beever. Trial before Judge Dougherty ended September 2. Client found guilty. Prosecutor M. Brnovich.

Roland Steinle: Client charged with child molestation. Trial before Judge Portley ended September 2. Client found **not guilty**. Prosecutor S. Evans.

Nina Stenson: Client charged with criminal trespass, interfering with judicial proceedings, and assault (with 3 priors and while on probation). Investigator R. Barwick. Trial before Judge Brown ended September 12. Client found **not guilty** on criminal trespass and assault. Judgment of acquittal on interfering with judicial proceedings. Prosecutor L. Krabbe.

August 31

Lisa Gilels: Client charged with manslaughter (dangerous), aggravated assault (dangerous), and two counts of endangerment. Investigator D. Beever. Trial before Judge Gerst ended September 8. Client found **not guilty** of manslaughter, aggravated assault and endangerment. Found guilty of negligent homicide (non-dangerous). Prosecutor M. Ainley.

Rena Glitsos and Nancy Johnson: Client charged with kidnapping. Trial before Judge Bolton ended September 8. Client found guilty. Prosecutor S. Yares.

Gary Hochsprung: Client charged with possession of narcotic drugs, assault, and resisting arrest. Trial before Judge Anderson ended September 2. Client found guilty. Prosecutor J. Davis.

September 1

Scott Halverson and Doug Gerlach: Client charged with sexual assault, kidnapping, and sexual conduct with a minor. Investigator V. Dew. Trial before Judge Barker ended September 20. Client found guilty. Prosecutor R. Campos.

Louise Stark: Client charged with second degree homicide and armed robbery. Trial before Judge Dann ended September 13. Client found guilty. Prosecutor N. Levy.

September 7

Larry Grant: Client charged with robbery and burglary. Trial before Judge Seidel ended September 9. Client found guilty. Prosecutor S. Yares.

Valerie Shears: Client charged with possession of narcotic drugs for sale and misconduct involving weapons. Trial before Judge Schneider ended September 8 in a mistrial. Prosecutor D. Schlittner.

September 8

David Brauer: Client charged with aggravated assault. Trial before Judge O'Melia ended September 13. Client found guilty. Prosecutor G. Thackeray.

Joseph Stazzone: Client charged with aggravated assault (dangerous). Trial before Judge Schwartz ended September 14. Client found guilty. Prosecutor L. Tinsley.

September 9

Gene Barnes: Client charged with theft. Investigator H. Brown. Trial before Judge Hilliard ended September 27. Client found **not guilty**. Prosecutor J. Blomo.

September 13

Randy Reece: Client charged with two counts of armed robbery. Investigator C. Yarbrough. Trial before Judge Chornenky ended September 16. Client found guilty. Prosecutor M. Brnovich.

Nina Stenson and Dan Carrion: Client charged with three counts of child molestation, two counts of kidnapping, two counts of sexual conduct with a minor, one count of sexual abuse (with priors). Investigator D. Erb. Trial before Judge Bolton ended September 29. Judgment of acquittal on sexual abuse charge. Guilty on all other charges. Prosecutor L. Schroeder-Nanko.

September 14

Susan Corey: Client charged with aggravated assault and aggravated DUI (dangerous). Investigator H. Brown. Trial before Judge Dann ended September 17. Client found guilty. Prosecutor D. Palmer.

Donna Elm: Client charged with escape in the second degree (with prior) and theft. Trial before Judge Galati ended September 14. Client found guilty on escape (dropped prior). Theft was dismissed. Prosecutor D. Cunanan.

(cont. on pg. 7)

Paul Lerner: Client charged with sexual assault. Investigator M. Breen. Trial before Judge Sheldon ended September 23. Client found **not guilty**. Prosecutor S. Evans.

September 15

Brad Bransky: Client charged with aggravated assault. Trial before Judge Martin ended September 17. Client found **not guilty**. Prosecutor J. Charnell.

Reginald Cooke and Barbara Spencer: Client charged with forgery (while on release and with priors). Trial before Judge Seidel ended September 16. Client found guilty (judgment of acquittal on priors). Prosecutor D. Schlittner.

Rebecca Potter and Bob Doyle: Client charged with possession of marijuana (with 2 priors), criminal damage and false imprisonment. Trial before Judge Ryan ended September 27. Client found guilty. Prosecutor C. Richards.

September 16

Jerry Hernandez: Client charged with aggravated DUI. Trial before Judge Portley ended September 16. Client found guilty. Prosecutor C. Smyer.

September 20

Rebecca Donohue and Bob Doyle: Client charged with possession of narcotic drugs and possession of stolen property (with 2 priors). Trial before Judge O'Melia ended September 27. Client found **not guilty**. Prosecutor R. Walecki.

Richard Kreyer: Client charged with fraudulent schemes. Investigator D. Beever. Trial before Judge Brown ended September 27. Client found guilty. Prosecutor S. Madden.

September 21

Peter Claussen: Client charged with armed robbery. Trial before Judge Dann ended September 28. Client found guilty. Prosecutor S. Yares.

Reginald Cooke and Barbara Spencer: Client charged with aggravated DUI. Trial before Judge Seidel ended September 28. Client found guilty. Prosecutor S. Bartlett.

September 22

Robert Billar: Client charged with leaving the scene of an accident. Trial before Judge D'Angelo ended September 27. Client found guilty. Prosecutor J. Burkholder.

Greg Parzych: Client charged with theft. Investigator T. Thomas. Trial before Judge Grounds ended September 28. Client found **not guilty**. Prosecutor J. Hicks.

September 27

Kevin Burns: Client charged with sexual assault. Investigator H. Scherwin. Trial before Judge Martin ended September 27. Client found guilty. Prosecutor M. Kemp.

James Cleary: Client charged with extortion. Investigator H. Brown. Trial before Judge Ryan ended September 29. Client found guilty. Prosecutor C. Como.

September 28

Ray Schumacher: Client charged with sale of cocaine. Trial before Judge Sheldon ended September 30. Client found guilty. Prosecutor C. Leisch.

September 30

Timothy Agan: Client charged with aggravated DUI. Trial before Judge Ryan ended October 4. Client found guilty. Prosecutor J. Burkholder.

Arizona Advance Reports

Volumes 137, 138, and 139

State v. Anderson,
137 Ariz. Adv. Rep. 3 (S.Ct. 4/13/93).

Defendant was charged and convicted of three counts of sexual assault. At trial the state asked three of defendant's four character witnesses whether they knew defendant had admitted to stealing drugs. There was no objection to these questions. The court of appeals held that the prosecutor's questioning of the defendant's character witnesses constituted fundamental error. The Arizona Supreme Court finds the record inadequate to support this determination. It was inappropriate to consider the issue as fundamental error. The trial court had not had the opportunity to conduct an evidentiary hearing on the question and to develop a record on the issue. The preferred procedure is to raise the issue in a proceeding for post-conviction relief. The decision of the court of appeals is vacated without prejudice to the filing of a petition for post-conviction relief.

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State v. Kiles,
137 Ariz. Adv. Rep. 8 (S.Ct. 4/15/93).

Defendant was charged with the first degree murder of his girlfriend and her two small children. He also was charged with two counts of child abuse. He was sentenced to death on each murder conviction and two consecutive prison terms on the child abuse convictions.

At trial, defendant requested an instruction on voluntary intoxication. The instruction was refused because defendant was charged only with knowingly killing the victims, not intentionally killing them. Defendant claims it was fundamentally unfair for the prosecution to charge him with acting knowingly and then argue at sentencing that the trial court should impose the death penalty because the defendant actually intended to kill. A first degree murder conviction may be based on either intentional or knowing conduct. The state's reasons for charging a knowing mental state rather than an intentional mental state are irrelevant. Even if the state charged the crimes as knowingly rather than intentionally committed to preclude the introduction of the defendant's intoxication, this legal strategy is acceptable.

Defendant claims that once he was found guilty of acting knowingly he could not be sentenced for acting intentionally because trial and sentencing are part of a continuum. Defendant also claims that the trial court must have found that he acted intentionally where it found the aggravating circumstance of cruelty. To find cruelty, a trial court need not find that the defendant intended to kill, only that a defendant intended to inflict mental anguish or physical pain. The intent required to establish the aggravating circumstance of cruelty is not that defendant intended to kill the victims. Defendant also claims that a finding of cruelty is the same as a finding of intentional murder because cruelty is established whether or not a defendant reasonably foresaw a substantial likelihood that his actions would be cruel. "Reasonably foreseeing" is not a more culpable mental state than knowing. Defendant was not necessarily sentenced under a different culpable mental state from that under which he was convicted.

Defendant contends that the death penalty was improperly imposed because the special verdict lacked the required specificity regarding non-statutory mitigating factors considered and rejected. The special verdict is sufficient if it resolves the material and relevant factual disputes raised by the evidence and says what significant mitigating circumstances were found by and weighed by the judge. A sentencing judge is not required to make exhaustive findings or cite every claim or nuance advanced by the defendant.

Upon independent review, the supreme court found all three murders were heinous, cruel and/or depraved. Defendant's voluntary intoxication was insufficient to call for mitigation. The domestic dispute nature of these murders is not a mitigating circumstance. There is no reason why defendant should be granted leniency simply because he kills a loved one rather than a stranger.

State v. Runningeagle,
State v. Tilden,
137 Ariz. Adv. Rep. 21 (S.Ct. 4/20/93).

Runningeagle and Tilden were charged with two counts of first degree murder, two counts of theft and several burglary counts. Runningeagle was sentenced to death and Tilden was sentenced to consecutive life terms.

Appeal of Runningeagle

Defendant claims he was denied effective assistance of counsel because his lawyer failed to join Tilden's motion to sever the trial. A severance was not required. Defendant's and Tilden's defenses were not antagonistic to the point of being mutually exclusive.

Defendant claims that his lawyer's closing argument was deficient because he conceded that the state had proven virtually every element of the case. The record does not support this argument. Defendant's lawyer merely argued in alternative hypotheticals. His argument was not deficient.

During opening statements, the prosecutor characterized the crime in terms like "horror" and "evil." The trial court sustained a defense objection but denied a mistrial. Although the prosecutor's use of the words "horror" and "evil" are argument and thus objectionable, there was no appeal to passion or prejudice. The words were merely a characterization of the evidence. The evidence would show "horror" and "evil" behavior. That these inferences were made at the beginning at the of the case rather than at the end of the case where they belonged does not warrant a new trial. The motion for mistrial was properly denied.

Defendant claims that the trial court failed to make findings pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), that he actually killed, attempted to kill or intended to kill either victim. At sentencing, the trial judge listed as an aggravating circumstance the killing of helpless individuals. In sentencing the defendant, the court found that defendant did the actual killing. No finding under *Enmund* is satisfied in this case.

Defendant argues that the aggravating factors of pecuniary gain and cruelty are inapplicable because of a lack of proof beyond a reasonable doubt that he killed either victim. The jury found beyond a reasonable doubt that defendant committed first degree murder. The trial court found in the special verdict that defendant committed the murders. The aggravating circumstance of pecuniary gain is satisfied because the killing of the victims was done to complete the burglaries and to steal from the victims. The murders were also especially cruel. There were insufficient mitigating factors to call for leniency.

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Defendant argues that because he could not have committed the murders without also committing the burglary, the burglary sentences can not be consecutive to the murder sentences. Under *State v. Gordon*, 168 Ariz. 308 (1989) the first prong of the test is the identical elements test. The second prong is whether, given the entire transaction, it was factually impossible to commit the ultimate crime without also committing the secondary crime. Finally, the court must then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime.

After subtracting evidence of the murder, sufficient evidence remains to satisfy the elements of burglary. It was also factually possible to burglarize the victims without killing them. Finally, the defendant's conduct in committing the burglary caused the victim to suffer an additional risk beyond the killing because one crime presented a risk to property, the other presented a risk to life. Consecutive sentences are not prohibited in this case. This result does not change if the jury relied on either a felony murder theory or a premeditation theory.

Appeal of Tilden

Co-defendant claims that the trial court erred by refusing to give his requested instruction on manslaughter as a lesser included offense. There is no evidence to support that either Tilden or Runningeagle acted recklessly in causing a victim's death. Further, the confrontation between the victim and the defendant would not support a manslaughter instruction on the basis of a sudden quarrel. Words alone are not adequate provocation to justify a manslaughter instruction.

Co-defendant claims that it was error to deny his motion to sever his case from Runningeagle's. He claims he was prejudiced because the evidence was stronger against Runningeagle and because their defenses were antagonistic to each other. While the evidence was stronger against Runningeagle, the evidence against the defendant was also very strong. Moreover, co-defendant was also charged as Runningeagle's accomplice. Even if severed, the evidence against Runningeagle would have been admitted at co-defendant's trial. The jury was also given a proper limiting instruction. Defendant's non-presence defense was also not antagonistic to Runningeagle's insufficiency of the state's evidence defense. A defendant seeking severance based on antagonistic defenses must demonstrate that the defenses are mutually exclusive. Defenses are mutually exclusive if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant. The defenses were unrelated and the court did not err denying the motion to sever.

At trial, shoe print comparison testimony was admitted. Defendant argues that the state failed to show that shoe print comparisons have been recognized and gained general acceptance in the field of science. This argument is foreclosed by *State v. Coleman*, 122 Ariz. 99 (1979). Defendant also claims that the state's shoe print witness was not qualified to testify as an expert. The witness had spent over five years in the comparative analysis section of a crime laboratory, had been trained, had studied all available literature and had analyzed over 50 shoe prints and impressions while at the

laboratory. The court did not abuse its discretion in allowing this expert to testify. Defendant claims that the expert testimony did not assist the trier of fact because the jury could have made its own comparisons. Shoe print comparisons are hardly ordinary and are quite beyond common experience. The testimony was also relevant because the similarities tended to make the defendant's presence more probable. The probative value of the evidence outweighed its prejudice. (Tilden represented on appeal by Spencer D. Heffel, MCPD.)

State v. Vannoy,
137 Ariz. Adv. Rep. 36 (4/22/93).

Defendant was charged with aggravated driving under the influence of alcohol. Defendant was tested twice on an intoxilyzer. The results indicated that the machine had received a deficient sample on both tests. Defendant was not advised of his right to have an independent test done and no breath samples were preserved. The first test registered a BAC of .194 and the second test registered a BAC of .161. The test results were admitted over defense counsel's objection.

Defendant claims that the charge should have been dismissed because the defendant was denied the opportunity to talk to a lawyer before taking the breath test. However, two officers testified that defendant did not ask to call an attorney. The conflicting testimony created an issue of fact. The responsibility of resolving factual disputes rests with the trial court. Under these circumstances there is no basis for reversing the trial court's ruling.

Defendant argues that the charges should have been dismissed because the officers did not advise him of his right to an independent blood alcohol test. When the state charges a person with DUI, but chooses not to ask the person to submit to a blood alcohol test, it must inform the person of his right to obtain an independent test. Since the officers in this case asked the defendant to take an intoxilyzer test, it was not necessary to inform him of his right to an independent test.

Defendant claims that the breath test results should have been suppressed because the state did not provide him with a breath sample for an independent test. The state argues that defendant waived his right to have a breath sample preserved by failing to give an adequate sample. However, the state did obtain evidence from these breath tests and used the evidence against him. By failing to preserve a breath sample in this case, the state deprived the defendant the opportunity to counter the state's scientific evidence of intoxication with scientific evidence of his own. While the state normally has no obligation to aid a suspect in gathering potentially exculpatory evidence, the unique evidentiary circumstances in DUI cases justifies giving defendant a fair chance to obtain independent evidence of sobriety through preservation of breath samples. The trial court should have suppressed the intoxilyzer results because the state's failure to preserve a sample violated the due process clause of the Arizona Constitution. The conviction is vacated.

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State v. Armstrong,
137 Ariz. Adv. Rep. 43 (Div. 1, 4/22/93)

Defendant was charged with theft and attempted trafficking in stolen property. He was convicted and sentenced to concurrent terms totaling 11.25 years. Defendant tried to trade a stolen vehicle to an undercover officer for heroin. The police tape-recorded the transaction. On tape, defendant stated that he had purchased heroin and cocaine the previous night and needed money to buy drugs for resale. Defendant claims that the trial court erred in admitting the reference to prior drug transactions because the evidence of these other crimes was irrelevant and inadmissible. The taped statements were relevant to defendant's intent and motive to traffic in stolen property. His statement that he needed cash to buy drugs to sell tended to establish that he would trade the vehicle for drugs. The probative value of this evidence outweighed its prejudice.

Defendant claims there was insufficient proof of these other crimes to warrant their admission at trial. Defendant contends that his uncorroborated statements were insufficient evidence of these earlier crimes. Before evidence of a prior bad act may be admitted, there must be proof sufficient to take that case to a jury. In this case, the state did not attempt to prove these prior bad acts. The statements were offered to prove the crime of attempted trafficking in stolen property. An admission by a defendant to an uncharged offense may, if relevant and otherwise admissible, be admitted at trial absent independent proof of that offense.

On cross-examination, the police admitted that an informant provided them with investigative leads. The detective also admitted that the informant's name never appeared in the police reports. On redirect, the prosecutor asked why the detective attempted to protect the informant's confidentiality. The detective's response implied that the informant had been threatened by the defendant. Defense counsel moved for a mistrial. During closing argument, the prosecutor again made statements which defense counsel claimed implied threats against the informant by the defendant. A motion for mistrial was denied but the jury was admonished that there was no evidence that the defendant made any threats to the informant. The trial court did not abuse its discretion in denying defendant's mistrial motions. The suggested inference that the informant may have been subjected to threats if his identity were known is revealed only by a tortured interpretation of the fact. The word "threat" was never mentioned either by the witness or by the prosecutor. There is no indication in the record that the jury drew the inference suggested by counsel. Any possible prejudice to the defendant, however remote, was cured by the court's admonition.

Defendant claims he received ineffective assistance of counsel on post-conviction relief where his attorney failed to supplement his *pro per* petition. There is no constitutional right to an attorney in state post-conviction proceedings, even though a state-created right to counsel in such proceedings exists. A petitioner may not claim constitutionally ineffective assistance of counsel in such proceedings. Defendant's claim that he was in possession of prescription drugs, not dangerous drugs, is also groundless. The drug he possessed is a dangerous drug under the statute and he never claimed he had a valid prescription.

O'Meara v. Gottsfeld,
138 Ariz. Adv. Rep. 3, (Sup. Ct., 5/4/93)

At the beginning of the Grand Jury's term, the Grand Jurors were provided with a copy of the criminal code. On March 20, 1992, they were read the statutes pertaining to crimes involving possession and sale of marijuana. Defendants were indicted by the Grand Jury on April 29, 1992 for possession and sale of marijuana, without the applicable statutes having been reread. Defendant's motion for remand based on the prosecutor's failure to reinstruct on the definition of "knowingly" was denied. Defendants in grand jury proceedings are not afforded the same protections allowed defendants in a jury trial. Where there has been an instruction on all relevant statutes, no separate instruction is required for commonly understood terms. Due process requires only that the prosecutor read all relevant statutes to the grand jury, provide them with a copy of those statutes to refer to during deliberations, and ask if they want any statutes reread or clarified. Because evidence was accurately presented, and no relevant instructions were omitted, defendants were not denied a substantial procedural right. There was no violation of due process.

State v. Holguin,
138 Ariz. Adv. Rep. 5, (Div. 1, 5/4/93)

Defendant pled guilty to aggravated DUI and was sentenced to three years' probation and a fine. Though the parties stipulated to restitution, none was ordered. Thereafter, the defendant violated the conditions of his probation and was given the presumptive two years in prison and was ordered to pay restitution. The defendant must pay restitution even though it was not ordered at the original sentencing. The granting of probation merely defers imposition of sentence until a later date, and a defendant whose probation is revoked is sentenced as if he had never been on probation. By ordering restitution later, the trial court was not correcting an illegal sentence. The state did not waive the issue through its lack of objection to the sentence because when the court ordered probation, the sentence was not yet final. [Represented on appeal by Paul C. Klapper, MCPD.]

State v. Serna,
138 Ariz. Adv. Rep. 11, (Div. 1, 5/6/93).

Defendant was accused of molesting a fourteen-year-old child in July of 1989. At that time, the child molestation statute included children under the age of fifteen years. When defendant was indicted in 1991, the statute had been amended to include only children under fourteen years old. Defendant claims that the lack of a saving clause in the amendment requires the dismissal of pending criminal proceedings under the former statute. See current A.R.S. § 13-1410. The amendment of the statute only reduced the penalty for molestation of a fourteen-year-old; it did not de-criminalize the conduct. The legislative intent for the amendment was a legislative reduction of penalty for molesting a fourteen-year-old and not a legislative pardon.

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Defendant also claims that the general repealing statute (A.R.S. § 1-245) requires that a subsequent statute repeals a former law unless a saving clause applies. The general saving statutes (A.R.S. §§ 1-246 and 247) apply even though the amendment lacked an express saving clause.

State v. Martinez,
138 Ariz. Adv. Rep. 22 (Div. 1, 5/11/93).

During a visit to his sister's apartment, defendant pushed the front door closed while police officers were attempting to enter to search for narcotics. Defendant was charged with hindering prosecution. Defendant testified that he was playing a joke on who he thought was his brother. When he realized it was the police, he let them in.

Defendant claims his motion for judgment of acquittal should have been granted because the state had not shown defendant knew the police were executing a search warrant or knew of drugs in the apartment. He argues that the necessary element of intent to hinder apprehension of another person is lacking and that obstructing a search is not hindering prosecution. Pushing the door shut is insufficient; a showing of intent must be made. Drug paraphernalia was in plain sight in the apartment and some police testified they announced their intent before defendant closed the door. The evidence raised a question of fact for the jury. The trial judge properly denied the motion.

Defendant argues that he was entitled to a "mere presence" jury instruction. Defendant was not charged with any drug offenses, and his presence at the crime scene was not the issue. No error occurred.

During trial, the state introduced prior felony convictions to impeach defendant's credibility. In closing argument, the prosecutor told the jury that the Arizona Supreme Court has said that a felon may reasonably be expected to be untruthful if it is to his advantage. Allowing the prosecutor's argument was reversible error. The argument was inconsistent with RAJI Standard Instruction No. 5A and informed the jury about extraneous matters not admissible in evidence. The comments effectively created a presumption against the credibility of a convicted felon. Conviction reversed and case remanded for a new trial. [Represented on appeal by Garrett W. Simpson, MCPD].

State v. Hone,
138 Ariz. Adv. Rep. 27 (Div. 1, 5/11/93).

Defendant was driving a livestock trailer with horses. He was pulled over by an Arizona Livestock Officer. A.R.S. § 24-261(C) empowers livestock officers to stop persons transferring livestock to check for documents and evidence of ownership. The owner was charged with not having the required documents. A.R.S. § 24-261(C) is unconstitutional because it empowers Arizona livestock officers to conduct random, roving patrol stops of any vehicle capable of carrying hides or livestock without a reasonable suspicion or probable cause based on articulable facts that a person is in violation of Arizona state law. The Arizona statute fails to meet the conditions set forth in *New York v. Burger*, 482 U.S. 691 (1987) allowing for the warrantless search of closely

regulated businesses. *Burger* requires that there must be a substantial government interest, the warrantless inspection must be necessary to further that interest, and the statute must advise the owner of the commercial premises that the search is being made pursuant to law and must limit the discretion of the inspecting officers. The unfettered statutory discretion given to the officers violates the United States and Arizona Constitutions.

State v. Marvin Jean Sheppard,
138 Ariz. Adv. Rep. 31 (Div. 1, 5/11/93).

Defendant was convicted of kidnapping and attempted sexual assault. Before trial, defendant requested that the jury panel be asked whether they had been the subject of forced sexual conduct that did not, in their minds, amount to a criminal offense. The judge refused, but asked more general questions about crime victims and personal issues. There was no abuse of discretion by not asking defendant's proposed question. The scope of voir dire is left to the sound discretion of the trial judge. The other questions asked adequately addressed the "gist" of defendant's proposed question and defendant's proposed question would have confused the jury.

At trial, defendant admitted two prior felony convictions. Defendant was sentenced as a third-time offender. Defendant claims that these convictions were on the same occasion and count as only one prior under A.R.S. § 13-604(H). Defendant's prior convictions for theft and trafficking were a result of an incident in which an undercover police officer placed an order with the defendant for a particular type of vehicle. The judge did not err in sentencing defendant as a third-time offender. The theft of the vehicle and subsequent sale took place at different locations. Several hours elapsed before the sale, and there were two victims (the owner of the vehicle and the innocent buyer). (Judge Jacobson dissented because the undercover agent made a special request for a vehicle before defendant had control of it, thereby intertwining the two crimes into the same "occasion.") [Represented on Appeal by James Rummage, MCPD].

State v. Church,
138 Ariz. Adv. Rep. 35 (Div. 1, 5/11/93).

Defendant was convicted of DUI while driving on a suspended license. During closing argument, the prosecutor made a comment affirming defendant's right not to testify. Defendant claims that the prosecutor's comment was fundamental error. Any comment by the prosecutor drawing attention to the defendant's exercise of the right to silence is specifically disapproved. The prosecutor's comments, while highly improper, were not fundamental reversible error because the remarks simply affirmed the defendant's right not to testify.

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The notice of license suspension was mailed seven days before the arrest. A.R.S. § 28-453 provides that notice of a license suspension is complete upon mailing. Defendant claims this notice provision denies him due process of law because it presumes the impossible. The statutory presumption of notice upon mailing of revocation of license is proper as a constitutionally permissive inference. Once the state proves mailing of notice of suspension, the burden shifts to defendant to show he did not receive the notice. However, under other facts, this argument might have merit.

State v. Lang,
138 Ariz. Adv. Rep. 37 (Div. 1, 5/13/93)

Defendant was convicted of murdering his estranged wife. At trial, two key witnesses were two detectives who had questioned defendant on the day he was arrested. During the trial, a court reporter overheard one of the detectives fraternizing with some of the jurors. The jurors revealed the detective had contact with some of them. Defendant is entitled to a new trial. The test to determine when a new trial is warranted is whether prejudice may be fairly presumed from the facts. Fraternization between a witness and jurors may have an effect on the credibility afforded a witness and may thus affect the outcome of the trial. This may occur even though jurors have indicated their decision was not affected by the contact.

During one of his interviews with detectives and prior to arrest, defendant said he would answer no further questions. He then continued to speak to the detectives and made several incriminating statements. At an evidentiary hearing, a judge denied defendant's suppression motion except for the exact words used by defendant when he told detectives he no longer wished to speak to them. The prosecutor, in his opening, referred to statements made by defendant after he indicated he no longer wanted to speak to detectives. Defendant moved for a mistrial, but the trial judge denied the motion. The defendant's statements are admissible because he was not in custody when the statements were made, the prosecution made no mention of defendant's invocation of the right to counsel, and the trial judge's ruling was consistent with the first judge's ruling.

Defendant claims he was improperly denied a *Willits* instruction regarding a letter he may have written about the victim. The evidence was destroyed because the test for fingerprints rendered it impossible to test the saliva on the envelope. The instruction should have been given because, even though the letter was relatively unimportant with regard to determination of defendant's guilt, each side treated the letter as if it were highly significant. If the prosecution had the right to prove defendant wrote the letter, the defendant had the right to prove he did not. Therefore, the state's destruction of the evidence required the use of a *Willits* instruction. *Arizona v. Youngblood*, 488 U.S. 51 (1988) does not do away with the necessity of a *Willits* instruction. When it is uncertain what the exculpatory value of lost or destroyed evidence is, a defendant must show police acted in bad faith to mandate dismissal. A *Willits* instruction is the appropriate remedy, not dismissal. Since the case must be retried anyway, a *Willits* instruction should be given if the state again seeks to admit the letter.

Defendant claims it was error to give an accomplice liability instruction. The state was entitled to an accomplice instruction where defendant used physical evidence to infer that two people might have been involved in the victim's murder. [Represented on appeal by Spencer D. Heffel, MCPD.]

State v. Michael Alden Schurz,
139 Ariz. Adv. Rep. 3 (S.Ct. 4/15/93).

Defendant was found guilty of murder in the first degree and attempted aggravated robbery. He was sentenced to death. Defendant and his companions encountered some people and the victim outside a motel. Defendant wanted their beer and money. Defendant began punching and pushing the victim. The victim tried to get away by crawling under a chain-link fence. The defendant took a plastic jug which smelled like gasoline and threw it on the victim. The defendant used a lighter and ignited a small puddle of gasoline. He then kicked the burning puddle toward the victim. The victim went up in flames, and defendant and his companions fled. Defendant later said to one of his companions, "He wouldn't give me the money or the beer, so I burned him." About an hour and a half later, the defendant and his companions attempted to rob another man by holding a lighter flame to his neck. Defendant and one of his companions were arrested a few hours later, and charged with first degree murder and attempted aggravated robbery. Defendant's accomplice pled guilty to the robbery charge in return for testifying against defendant. The accomplice was placed on probation. Defendant's principal theory at trial was that his accomplice had been the one who had killed the victim. Defendant also argued that his intoxication made it impossible for him to form the intent required for the offenses. Defendant was sentenced to death for murder and to the maximum total of twelve years for the attempted aggravated robbery with two prior convictions.

Trial Issues - Other Bad Acts

Defendant argues that evidence of the second robbery was improperly admitted in the homicide trial. Evidence of the robbery which occurred after the murder was admissible under Rule 404(b). The threatened burning tended to establish identity and motive, and rebutted the defense theory of intoxication. The court found that the companion's testimony was more than sufficient for the jury to find that the robbery after the murder had taken place and that the defendant had committed it. Defendant argued that the subsequent robbery evidence should be excluded under Rule 403. Although the evidence was harmful it was not unfairly prejudicial. Since identity was an issue, the probative value was not substantially outweighed by the danger of unfair prejudice. Once the defendant attempted to shift responsibility to his companion, the evidence had enough probative value to withstand any Rule 403 weighing process.

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Directed Verdicts

The trial court did not err in denying defendant's motion for a directed verdict on the attempted aggravated robbery charge. The state must produce enough evidence that a reasonable person could conclude that the defendant is guilty beyond a reasonable doubt. Defendant's accomplice testified that defendant suggested that they go back and rob the group at the motel for beer and money. The accomplice testified that he accompanied defendant as his accomplice and that defendant afterwards said that he burned the victim because he would not give him beer or money. This evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant had the requisite intent, that there was an accomplice present, and that defendant made some attempt, albeit unsuccessful, to get beer or money from the victim.

Defendant also moved for a directed verdict on the first degree murder charge. Defendant argued that the evidence was insufficient to support the felony murder theory and that the court therefore erred in denying his motion. Since the jury also found defendant guilty of premeditated murder, the issue is moot.

Mental Examinations

The court did not err in denying the defendant's motions for a mental examination under Rule 11.2 and for a neurological examination seeking to determine whether he had an organic brain disorder. Defendant did not claim that he was incompetent to stand trial but maintained that the trial court deprived him of his due process right under the Fourteenth Amendment to retain, at state expense, a competent psychiatrist to evaluate his mental condition at the time of the offenses and to assist him in his defense. The trial court did not abuse its discretion in denying these motions based on the pre-screening report and the information presented in defendant's motions. There was nothing in the report to indicate that there was any real question regarding defendant's sanity at the time of the offenses. The report indicated drug and alcoholic use may have caused him black-outs, but this does not constitute an insanity defense. When his mental condition was at issue for mitigation at sentencing, he was authorized to retain a psychiatrist at county expense to assist him, and he did so.

Intoxication

Defendant requested a voluntary intoxication instruction as a defense to the charge of first degree murder. The court gave the voluntary intoxication instruction as a defense to the charge of attempted aggravated robbery but not to the charge of murder. The failure to give the defense instruction was not error. The murder charge instruction read "intended or knew". A.R.S. 13-503 makes voluntary intoxication a defense only to "intent." Knowingly is a less culpable mental state than intend and is included within it. Whenever a jury determines that a defendant acted intentionally, it necessarily concludes that he acted knowingly. Having concluded the defendant acted knowingly, the jury may not then consider voluntary intoxication as the defense.

Sentencing Issues

The trial court found one aggravating circumstance, that the murder was especially cruel, heinous or depraved within the meaning of A.R.S. 13-703(F)(6). It found no statutory mitigating circumstances but found that defendant had proved five nonstatutory mitigating circumstances. Defendant argued that the trial court erred in failing to find as a mitigating circumstance that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired by his intoxication, but not so impaired as to constitute a defense to prosecution. A.R.S. 13-703(G)(1). A psychological examination concluded that defendant knew what he was doing but because of his intoxication and the personality hardened by past institutionalization, he simply did not care. Defendant's uncaring attitude, even though partially caused by drug use, did not constitute an impaired ability to control his conduct.

Defendant claimed that the trial court erred in finding that the nonstatutory mitigating factors were not sufficiently substantial to call for leniency. Defendant argued that the disparity between his sentence and his accomplice's sentence required that his death sentence be modified to life imprisonment. The difference in culpability explains and justifies the disparity between defendant's death sentence and his accomplice's sentence to probation. The jury rejected the defense theory that the accomplice had actually set the victim on fire.

Post Conviction Relief Issues

Defendant filed a Rule 32 petition claiming he received ineffective assistance of counsel. The trial court denied an evidentiary hearing on the petition. The court did not abuse its discretion. Defendant failed to state a colorable claim of ineffective assistance. Defendant did not show how an unlocated witness or how different cross-examination questions would have helped. Defendant did not allege he was unaware of his right to testify, only that he now regrets his decision not to testify. A viable insanity defense was not available. Counsel's submittal of a 32-page sentencing memorandum justifies his decision not to call character witnesses. No evidentiary hearing was necessary.

State v. Lautzenheiser,
139 Ariz. Adv. Rep. 26 (Div. 1, 5/20/93)

Defendant was charged with aggravated DUI. Jurors returned a guilty verdict, after deliberating on the afternoon of New Year's Eve. When polled, one juror changed her verdict to "not guilty." After polling the other jurors, the trial court again asked the dissenting juror whether her verdict was guilty. She said it was not. The trial court then asked the foreman whether further deliberations would be helpful. The foreman did not think so. The trial court again asked whether the jury could reach a verdict if sent back to the jury room. The jury deliberated further and returned a guilty verdict late in the afternoon just before a holiday.

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Defendant claims that the trial judge coerced the jury into reaching a guilty verdict. The test of coerciveness is whether the trial court's remarks displaced the independent judgment of the jury. Under the totality of the circumstances, the attempts by the trial court to facilitate jury agreement were not coercive. Asking the dissenting juror for a verdict a second time did not place undue pressure on the dissenting juror. When the court knows of the jury's numerical division, particularly if the division is lopsided, encouraging the jury to decide can amount to coercion. The judge simply polled the jurors pursuant to Rule 23.4 and therefore the knowledge gained from the proper jury poll did not constitute coercion. Questioning the jury foreman twice did not impermissibly suggest to the jury that the court had any anxiety for or was demanding a verdict.

When a trial court sends a jury back for further deliberations, it is not mandatory that the court caution them "not to surrender their honest convictions." The timing of the proceedings, (the afternoon before New Year's Eve), did not constitute coercion. Finally, the trial court never referred to the sufficiency of the evidence before the jury when questioning and sending the jury back for further deliberations. (See also dissent.) [Represented on appeal by Lawrence S. Matthew, MCPD.]

State v. Elliget,
139 Ariz. Adv. Rep. 34 (Div. 1, 5/25/93).

Defendant, a police officer, pled guilty to sexual exploitation of a minor and facilitation to commit sexual conduct with a minor. Under the plea agreement, defendant was to receive life-time probation for one charge and prison for a term left to the court's discretion on the other. Defendant was sentenced to the maximum term.

Defendant claims that the judge improperly aggravated his sentence. Defendant argues that the court should not have inferred from his good record as an officer that he knew the wrongfulness of his conduct. A trial court may aggravate a sentence based on its finding that a special harm to society resulted from the crime because it was committed by a police officer. The judge did not view the defendant's otherwise good life as an aggravating factor. Although the defendant knew the serious consequences of his conduct, the court did not infer that knowledge from the defendant's prior good record as an officer or citizen. The court did not use the defendant's awareness of the wrongfulness of his conduct in aggravation. Rather, the judge clearly articulated the factors actually used in aggravation.

However, the trial court erred by aggravating the sentence under A.R.S. § 13-702(d)(8), which precludes aggravation unless "at the time of the commission of the offense, the defendant was a public servant and the offense involved conduct *directly related* to his office or employment." The trial court made no factual finding that the defendant's conduct was directly related to his employment as a public servant. Under the "appropriate to the ends of justice" catch-all clause of § 13-702(d)(13), a trial court may properly consider as aggravating those special injurious consequences to the community resulting from a crime being committed by a police officer. The clause may include any factor that relates to the character or background of the

defendant or the circumstances surrounding the commission of the crime that increase the crime's guilt or enormity or adds to its injurious consequences. A police officer, breaching a public oath and undermining public confidence in law enforcement, may increase a crime's "guilt or enormity," and may increase a crime's "injurious consequences." [Represented on appeal by Carol A. Carrigan, MCPD].

Matter of Maricopa No. JV-S01010,
139 Ariz. Adv. Rep. 37 (Div. 1, 5/25/93)

During questioning, a juvenile made statements before being read his *Miranda* warnings. The juvenile was not in custody, there was no *Miranda* violation, and the juvenile rules did not require warnings at that time. However, there was testimony that the juvenile was coerced into a confession by threats, and the record is ambiguous on the court's ruling. If any threat or promise was made, however slight, the statement must be suppressed. The case is remanded for this determination.

State v. Zanzot,
139 Ariz. Adv. Rep. 39 (Div. 1, 5/25/93)

Defendant was placed on probation for a class 6 felony. Later, he pled guilty to a misdemeanor offense in city court. At the violation hearing he admitted pleading guilty. The judge found him in automatic violation of his probation.

Defendant claims error because there was no determination that he understood the nature of the violation, his right to counsel, his right to confrontation, and the consequences of an admission. Rule 27.8, Arizona Rules of Criminal Procedure. The rule requires that the trial judge personally address the defendant, determine that he understands his rights, and voluntarily wishes to give them up. The trial judge erred in finding an automatic violation where the earlier plea and sentence were in a different jurisdiction. However, the error is harmless because the defendant does not allege any defect in the guilty plea proceedings in the other court. Defendant did not object to the automatic violation, and no fundamental error occurred. [Represented on Appeal by Paul Klapper, MCPD.]

State v. Freeland,
139 Ariz. Adv. Rep. 54 (5/27/93)

Defendant caused serious injuries to the victim in a traffic accident. Defendant was convicted of aggravated assault and DUI. Defendant was sentenced to life imprisonment without possibility of release for 25 years for the aggravated assault (while on probation), and two years for the DUI.

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Defendant claims that the victim's failure to wear a seat belt constituted an intervening, superseding cause that relieved the defendant of criminal responsibility for the severity of the victim's injuries. Although a victim's contributory negligence is generally no defense to criminal prosecution, a victim's conduct might constitute an intervening, superseding cause that breaks the causal chain. However, to be a superseding cause, the intervening conduct must be unforeseeable. One who drinks and drives should reasonably foresee that potential victims of drunken driving will not wear seat belts and that such victims might be seriously injured in an alcohol-induced collision. The jury was correctly precluded from considering whether the victim's failure to use a seat belt reduced the charged crime of aggravated assault to simple assault. The trial judge at sentencing may still consider in mitigation that a victim's injuries would have been less severe had the victim worn a seat belt or otherwise acted with reasonable care.

Defendant claims that it was improper to take judicial notice of the defendant's probationary status. The trial judge had been the sentencing judge for the defendant's probation violation proceeding. A trial court may take judicial notice of its own files to find probationary status, as the court's own records constitute reliable documentary evidence.

Defendant claims that the state failed to provide substantial evidence that defendant had actual notice of his driver's license suspension. The presumption of actual notice under A.R.S. § 28-210(b) did not apply, as DMV sent notice of suspension to the wrong address and the state failed to present evidence that DMV sent the notice by registered mail. The record, however, showed that the defendant knew or should have known that his license was suspended. The defendant had appeared in city court, and was fined on criminal citations and civil traffic citations. He also signed a form which provided that upon non-payment of fines his driver's license would be suspended.

Defendant claims he received ineffective assistance of counsel. Counsel's decision to concede the defendant's intoxication and alcohol abuse were tactical decisions. Defendant asserted that his alcohol use increased his tolerance and he was not impaired. Counsel's failure to object to some evidence and to a particular jury instruction were not prejudicial in light of the overwhelming evidence against the defendant.

Editor's Correction: Last month it was reported that the increase in the time payment fee begins on December 31, 1993. An alert reader pointed out that the increase in time payment fee was effective in April. Additionally, while the surcharge is raised to 46% by A.R.S. 12-116.01 beginning January 1, 1994, A.R.S. 12-116.02 also allows another 11% assessment for an aggregate amount of 57%. This amendment also takes effect on January 1, 1994. Corrections, articles from public defenders, and comments are always welcomed by *for The Defense*.

Motion & Brief Bank

Editor's Note: The Maricopa County Public Defender's Office Motion and Brief Bank contains motions, jury instructions, and appellate briefs. The brief bank is for the use of all county public defenders. Terminals for the Brief Bank are located on the 10th Floor in the Main Library (Downtown), on the 3rd Floor in the Appeals Library (Downtown), at the Durango Juvenile Facility (Durango Court Center), and in Trial Group C (Southeast Court Center). The following notes some recent deposits. Please retrieve information directly from the Brief Bank or contact the author.

Note: If you are contributing a motion for the bank, please provide the concluding minute entry.

Briefs

State v. Nisius, 1 CA-CR 92-1565 (Reply Brief Filed August 10, 1993).

Author: Garrett Simpson. Client moved to suppress all evidence, and claimed that the prosecution could not show an exception to the warrant requirement. The prosecution presented a truncated suppression hearing devoid of facts to support a "plain view" exception. In other words, the state did not carry its burden of proof---nevertheless the trial court refused to suppress the illegally obtained evidence.

State v. Holbrook, 1 CA-CR 93-0279 (Opening Brief Filed August 5, 1993).

Author: Paul Klapper. This case involves a probation violation hearing where the client was charged with numerous violations. The client appeals from the finding that he was able to pay certain fees. The brief argues that according to *Beardon v. Georgia*, 461 U.S. 660 (1984), the trial court must make an inquiry as to the reasons why a defendant fails to pay probation fees. In this case no *Beardon* inquiry was made. In fact, in this case the testimony indicated that the client was making payments to his wife for child support. This brief argues that the obligation to support wife and child is superior to the probation and victim compensation.

State v. Menchaca, 1 CA-CR 93-0290 (Opening Brief Filed August 27, 1993).

Author: Paul Klapper. This brief argues, among other things, that the client's conviction should be overturned because of the incorrect reasonable doubt instruction. The court instructed the jury that:

(cont. on pg. 16)

"The term 'reasonable doubt' means doubt based upon reason. This does not mean an imaginary or possible doubt. It's a doubt which may arise in your minds after careful and impartial consideration of all of the evidence or from the lack of evidence.

The brief argues that the instruction confused the jury because it excludes "imaginary" and "possible" doubt from what a reasonable doubt may be. Certainly, a possible doubt may be a reasonable one. Moreover, a simple dictionary definition of "possible" notes that it may mean "practical" or "feasible." Possible implies that a thing may certainly exist or occur given the proper conditions.

Further, given the fact the the jurors are not lawyers, excluding "possible" doubt may very well confuse them and deny an accused basic due process.

Editor's Note: Practitioners may want to consider objecting at the trial level to any instruction that precludes the jury from considering a "possible doubt." Moreover, drafting a reverse instruction and submitting it may be helpful. The instruction may specifically provide that a "reasonable doubt" includes a possible doubt as long as it is one based on reason.

State v. Gates, 1 CA-CR 91-1637 (Reply Brief Filed August 12, 1993).

Author: Stephen Collins. This reply brief argues that in order for a violation of A.R.S. 13-3553 to occur, the minors in the photographs must actually be "engaged in sexual conduct." Photographs of "merely nude" minors are not included in the statutory definition. Practitioners with cases under A.R.S. 13-3553 involving photographs of minors not engaged in sexual conduct should review this brief or talk with its author.

State v. Peoples, 1 CA-CR 92-1847, (Opening Brief Filed August 9, 1993).

Author: Brent Graham. This case involves the robbery of a bakery. The defendant demanded money from a cashier, left the premises, and was apprehended later. Although the defendant never presented a note during the robbery, a handwritten note was found inside his wallet that read: "Give me all the money and you won't get hurt. Anything else is dangerous."

Trial counsel, by written motion, moved to preclude the note as being unduly prejudicial. The state argued that it was admissible under Ariz. R. Evid. 404(b). The trial court held that the note was not unduly prejudicial---despite the fact that the robbery note was never presented to the victim. Since the note was not presented, it was another "act" under Rule 404(b).

In this case, however, the defendant never used the note in connection with the bakery robbery. There was also no evidence to connect the note to another robbery or crime involving the defendant.

State v. Peller, 1 CA-CR 92-1858 (Reply Brief Filed August 9, 1993).

Author: Paul Prato. This brief argues that the trial court abused its discretion by failing to let the client out of a plea agreement from which he wished to withdraw.

The client indicated that he did not understand the full consequences of his no contest plea. The state argues that the written record contains "boiler plate" language. The author notes that, "[f]ormalistic recitations are not enough."

Personnel Profiles

Since October 12, we have had a new person on board in a grant-funded position to administer a pilot program. Francine Martin will research the feasibility of a "Statewide Appellate Relief Program" which would involve our appeals division offering services to interested agencies (e.g., rural Arizona counties) charged with the responsibility for appeals and post-conviction relief (PCR) petitions. Francine comes to our office after working in county health programs for the last three years. Prior to that she was an administrator in the Arizona State Department of Health Services for five years.

Robyn McLemore started as the office aide in Trial Group C on October 04. Robyn comes to us after 2½ years of studying political science at BYU. While at the university, Robyn worked in the BYU Bookstore year for two years, and she possesses a variety of office skills. As a hobby, she enjoys speaking French.

Bulletin Board

Speakers Bureau

David Katz, Ellen Katz, Liz Langford, Slade Lawson, and Jeremy Mussman recently joined our Speakers Bureau.

On September 22, Ellen Katz spoke at Beth El Congregation on "Law -- Everything Teens Need to Know." She represented the defense perspective on such issues as curfew laws, juvenile rights, and what teens should do when contacted by police officers.

Jeremy Mussman addressed several 5th through 8th-grade classes at Creighton Middle School on October 08 as part of the State Bar's Youth Drug and Alcohol Program. He reviewed the juvenile laws (focusing on alcohol and drugs) and noted how these could affect a youth's life.

Also on October 08, Liz Langford and Slade Lawson presented information on drug and alcohol laws to 8th-grade classes at Gilliland Junior High School as part of the State Bar's Youth Drug and Alcohol Program.

Kim O'Connor spoke to a Justice Studies class at ASU on October 12. She discussed Public Defenders' duties, our interactions with the County Attorney's Office and courts, and the plea bargaining process.

TRAINING AT A GLANCE

| DATE | TIME | TITLE | LOCATION |
|-------------------|------------------------|---|---------------------------|
| Wed., October 27 | 9:30 a.m. - 11:00 a.m. | <i>Support Staff Training "Our Juvenile Justice System"</i> | MCPD Training Facility |
| Wed., November 10 | 10:00 a.m. - 6:00 p.m. | <i>"Art of Advocacy/Act of Communication for Criminal Defense Attorneys"</i> | MCPD Training Facility |
| Wed., November 17 | 8:30 a.m. - 4:30 p.m. | <i>Criminal Code Revisions Telecast in conjunction with Arizona Supreme Court, et al.</i> | (To Be Announced) |
| Wed., December 01 | 1:30 p.m. - 3:30 p.m. | <i>"The Changing Criminal Code: A Support Staff Primer"</i> | MCPD Training Facility |
| Fri., December 17 | (to be announced) | <i>Criminal Code Revisions (to be titled)</i> | Board of Supervisors Aud. |
| | | | |

For The Record

1) Trivia Question:

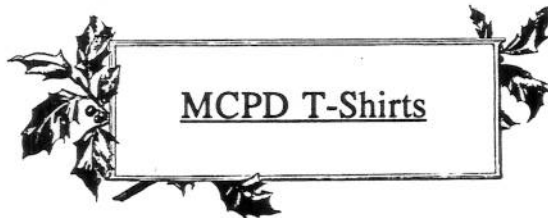
What famous trial lawyer said, "Justice is the greatest concern of man on earth."?

(Answer: Daniel Webster)

2) *"The first thing we do, let's kill all the lawyers."*

We hear this quote being bandied about a lot these days. One author even patterned his book title after it. Unfortunately, the quote usually is taken out of context and its meaning grossly distorted.

This quote comes from Shakespeare's *Henry VI*. Most of us know that. What a lot of people do **not** know (and critics of attorneys conveniently omit) is the fact that this quote comes in a speech by a follower of an anarchist who seeks to overthrow the government. The gist of the speech is that any leader who wishes to take over and destroy individual freedoms must first "...kill all the lawyers." Thus, this line is actually the ultimate compliment to attorneys who are viewed as vital to the protection of individual liberties and rights. Just for the record.



Holidays are approaching and people are clamoring for unique gift ideas. What could be more unique than a Public Defender T-shirt?

In keeping with our creative approach to life, we have modified the design -- our third production line and our third design. This production will have our newsletter name and our office name on the front, left-breast pocket area. (*See sample below.*)

[NOTE: the shirt has no pocket on the front and no lettering will be printed on the back.]

The 100% cotton, beefy T's will come in white or gray with royal blue lettering. And the price is a nominal \$12.00.

Anyone who wants a T-shirt (or shirts) should complete the order form below, and give the form and a check (payable to "Christopher Johns") to Georgia Bohm before December 01. [NOTE: checks are preferred.] We should receive the shirts by December 10, depending on the size of our order. **Orders must be prepaid.**

As usual, any money left over from the sale of the T-shirts will go to our office's Holiday Fund. If you have any questions, please call Georgia.

SAMPLE: *for The Defense*
Maricopa County
Public Defender's
Office

[NOTE: Sample is not the actual size of lettering to be used on T-shirts.]

P.D. T-SHIRT ORDER FORM

Name: _____ Phone: _____

| | White | Gray |
|-----------------|-------|------|
| <i>Small</i> | | |
| <i>Medium</i> | | |
| <i>Large</i> | | |
| <i>X-Large</i> | | |
| <i>XX-Large</i> | | |

Check enclosed for : \$ _____ (\$12.00 per shirt)

Please return order form to Georgia Bohm before December 01, 1993.